

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARVIN A. RHODEMAN, SR.

Claimant

VS.

MOORE MANAGEMENT

Respondent

AND

HARTFORD ACCIDENT & INDEMNITY

Insurance Carrier

)
)
)
)
)
)
)
)
)
)

Docket No. 234,890

ORDER

Claimant appeals from an Order for Production of Records entered by Administrative Law Judge Bryce D. Benedict on May 7, 1999.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared on behalf of claimant. Michael J. Haight of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

ISSUES

Claimant contends the Order for Production of Records is overly broad and should be declared unenforceable. Also at issue is whether this appeal is from a final order. The Board's jurisdiction is limited to review of final orders except for appeals from a preliminary hearing. This is not an appeal from a preliminary hearing and the Board does not have jurisdiction unless the order is a final award or order. K.S.A. 1998 Supp. 44-551.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments made by the parties, the Board finds and concludes that portion of the Order requiring production of all vocational rehabilitation and employment records should be, and is determined to be, invalid.

The facts are not in dispute. Claimant alleges injury to his back, neck, face, chest, and body on two occasions in 1998 while working for respondent. During the proceedings on the claim, respondent's counsel prepared an "Order for Production of Records" and asked claimant's counsel to approve the Order for signature by the Administrative Law Judge. After hearing arguments, the Administrative Law Judge signed the Order. Highly summarized, the Order purports to require that all health care providers, vocational rehabilitation counselors, and employers provide records to respondent's counsel. The Order includes a list of types of records to be provided and can be understood to require production of all employment records.

On appeal, claimant does not dispute the portion of the Order relating to medical records. Claimant acknowledges that filing the action acts as a waiver of the patient-physician privilege. But, claimant's counsel does dispute the order for production of all vocational rehabilitation and employment records.

Before reaching the merits of claimant's argument, the Board must first determine whether it has jurisdiction to consider this appeal. K.S.A. 1998 Supp. 44-551 grants the Board jurisdiction to review the following:

All **final** orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. [Emphasis added.]

The limitation to "final" orders was not in the original, 1993, version of K.S.A. 44-551. That term was added in 1997 after the Court of Appeals had ruled that the Board's jurisdiction included the right to review such orders as an appointment of a neutral physician and held that the Board's jurisdiction was not limited to review of final orders or awards. *Winters v. GNB Battery Technologies*, 23 Kan. App. 2d 92, 927 P.2d 512 (1996). We find no subsequent appellate decision which defines "final" order in this specific context of this Board's review. The term "final" is, of course, defined as it relates to review by the Court of Appeals and this is a logical source for a definition.

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. But the Court of Appeals has also recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. The Court states three criteria which also make an order a final order. The order may be final even if it does not resolve all issues between the parties if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgement. *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

In our view, the current Order satisfies these three criteria. The Order conclusively determines whether respondent is entitled to have production of the records in question. The Order is completely separate from the merits of the action and is effectively unreviewable on

appeal after the documents have been produced. The Court of Appeals has held that sanctions for failure to comply with discovery does not satisfy these three criteria because an order for sanctions is subject to effective review on appeal. *Reed v. Hess*, 239 Kan. 46, 716 P.2d 555 (1986). In fact, most orders can be effectively reviewed. Orders such as that in the *Winters* case, an order for appointment of a neutral physician, decisions regarding terminal dates, admission of evidence, and most other orders can be effectively reviewed in the sense that there remains a remedy. In this case, however, the interest involved is the interest in protecting confidential information not relating to the workers compensation proceeding. Claimant uses, as an example, information relating to one's children used to justify leave under the Family Leave Act. There could be numerous other examples. But once the information is disclosed, there is no remedy. The Kansas Court of Appeals borrowed this definition of final orders from the federal courts. The federal courts have generally not permitted appeal from discovery orders and have instead insisted the parties force the issue to sanctions or contempt charges which can then be reviewed in a later appeal. *Connaught Lab., Inc. v. SmithKline Beecham P.L.C.*, 165 F.3d 1368, 49 U.S.P.Q.2d 1540 (Fed. Cir. 1999). But the workers compensation system does not have the same contempt and sanction options. Appeal of the order itself is the only effective option. The decision should, therefore, be considered final and subject to review.

As to the merits, claimant does not, as indicated, dispute the portion of the Order relating to medical records and the Board will not address that portion of the Order. The only issue is related to production of employment records. The Act gives the Director and the Board the power to compel the production of documents and records to the same extent as is conferred on district court of this state under the code of civil procedure. K.S.A. 44-549. The Board agrees that the Order for production of vocational rehabilitation and employment records in this case is too broad. It can reasonably be read to include any employment record. Respondent is entitled to discover information necessary to ascertain what tasks claimant performed in the 15 years before the accident. K.S.A. 44-510e. Respondent is also entitled to information the employers or vocational rehabilitation counselors might have about related injuries as well as the skills claimant may have to apply if new employment becomes necessary. And, depending on the issues in the case, respondent may be entitled to various other types of information from previous employers and vocational rehabilitation counselors. But the respondent is not entitled to each and every document from claimant's prior employment without limitation on the period or the types of documents to be disclosed. The Order can be reasonably narrowed and at the same time protect the interests of both parties. The Board, therefore, concludes that portion of the Order relating to vocational rehabilitation and employment records should be declared void.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that that portion of the Order for Production of Records entered by Administrative Law Judge Bryce D. Benedict on May 7, 1999, which would require production of vocational rehabilitation and employment records, is hereby reversed and considered void and the case

is remanded to the Administrative Law Judge for further proceedings not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Michael J. Haight, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director